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No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board,
Ronald T. Keller, Daniel Shellenbarger,
and Ohio Senator Richard T. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and
Knights of the Ku Klux Klan,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF CHABAD HOUSE OF WESTERN MICHIGAN, INC.; CONGREGATION LUBAVITCH OF CINCINNATI, OHIO; CHABAD-LUBAVITCH OF VERMONT; CHABAD-LUBAVITCH OF GEORGIA; CHABAD LUBAVITCH OF BROWARD & PALM BEACH COUNTIES; CHABAD OF PITTSBURGH; AND LUBAVITCH OF INDIANA, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI

This brief is filed pursuant to Rule 37.3 with the consent of the parties.

The *amici* are local organizations affiliated with the world-wide Lubavitch movement, which seeks to educate the Jewish people, to encourage and facilitate religious observance by all Jews, and to promote universal respect for Jewish traditions and practices. During the eight-day Jewish holiday of Chanukah, each of the *amici* has sought to display a large menorah in its own community at one or more central locations — frequently including a public park or square. The purpose of this display is to demonstrate how the religious holiday is traditionally observed and to publicize the Chanukah miracle.

These efforts to deliver a religious message to Jews and non-Jews who visit traditional public forums have embroiled the *amici* in federal-court litigation. As a result of this litigation, the *amici* secured rulings from two *en banc* courts of appeals establishing the constitutional proposition on which the court of appeals relied in this case. We briefly summarize the history of the *amici*'s litigation.

1. In one case municipal authorities permitted the local Lubavitch organization to include a menorah in a municipally sponsored holiday display, but a private group filed suit to exclude the menorah. This resulted in this Court's decision in *Allegheny County v. ACLU*, 492 U.S. 573 (1989), in which the presence of a menorah in Pittsburgh's "combined" holiday display on the steps of City Hall was held by this Court to be constitutionally permissible.

2. In some other cities, the local Lubavitch organization was permitted, during Chanukah, to display its privately financed menorah, standing by itself, in a public forum. Those displays were also challenged by citizen groups that claimed to be defending the "wall of separation" allegedly mandated by the Establishment Clause of the First

Amendment. In a case involving the City of Grand Rapids, Michigan, a federal district court determined that the display of a solitary menorah in a traditional public forum by Chabad House of Western Michigan violated the Establishment Clause. A panel of the Court of Appeals for the Sixth Circuit affirmed that decision by a 2-to-1 vote. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990). On rehearing *en banc*, the Sixth Circuit held by a 9-to-6 vote that the menorah could be displayed because the display of a private religious symbol at a traditional public forum is absolutely protected by the Free Speech Clause of the First Amendment. *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992). That decision was the precedent on which the court below relied in the case that is now before this Court.

3. In other jurisdictions, as well, these *amici* have been successful in asserting their First Amendment free-speech rights to display a menorah at a traditional public forum. For example, the City of Cincinnati refused to permit such a display at Fountain Square — a public forum that is remote from government buildings. Congregation Lubavitch of Cincinnati won a preliminary injunction and, thereafter, a permanent injunction against that policy. *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993). The same has been true in White Plains, New York. *Flamer v. City of White Plains*, 841 F. Supp. 1365 (S.D.N.Y. 1993).

4. In Atlanta, Georgia, a 15-foot-high menorah was authorized in 1989 on the plaza in front of the State Capitol Building. After an application for such a display was denied in 1990 on technical grounds, Chabad-Lubavitch of Georgia sought permission to display a menorah in 1991

in the Capitol Rotunda — an open space under the dome — which had previously been the site of other unattended displays. A district court sustained the state's exclusion of the menorah on summary judgment, and a split panel of the Eleventh Circuit affirmed. *Chabad-Lubavitch of Georgia v. Miller*, 976 F.2d 1386 (11th Cir. 1992). On rehearing *en banc*, the Eleventh Circuit unanimously vacated the panel opinion and held that Chabad had a First Amendment free speech right to display its menorah in the public forum that the state had created. *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993).

5. In the Second Circuit, a decision by the City of Burlington, Vermont, to permit the private display of a menorah by Chabad-Lubavitch of Vermont resulted in a 2-to-1 constitutional ruling that barred the display under the Establishment Clause. *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). The City of Burlington thereafter turned down an application to display a menorah under slightly different circumstances, and the Second Circuit refused to overrule the *Kaplan* decision in *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

The present case presents the constitutional issue that these *amici* have litigated, with frequent success, in the lower federal courts. We are, of course, not in sympathy with the Knights of the Ku Klux Klan. We unequivocally condemn the organization's racism and anti-Semitism. The message of hate that the KKK transmits to its followers is repulsive to these *amici*, and we support all measures that the law countenances to prevent and combat the KKK's activities.

The courts below have, however, accepted the factual proposition that, in this case, the KKK was seeking only to convey a religious message for a limited period of time coincident with a religious holiday season. This case comes to this Court in that context, and the constitutional issue presented is whether a private organization has the constitutional right to display a religious symbol in a public forum that is closely associated with the seat of government. Since the *amici* firmly believe that the answer to this abstract constitutional issue must be affirmative and the *amici* have successfully urged that proposition before various lower federal courts, we file this brief in support of the constitutional position being argued by a group that is otherwise an enemy of the Jewish people.

ARGUMENT

Introduction

This case concerns (1) speech (2) in a public square (3) by a private group. The combination of these three elements ordinarily guarantees constitutional protection under the First Amendment. Streets and public parks owned and regulated by governments of free societies have always been places where individual citizens are encouraged to exchange ideas and to debate public issues. Speaker's Corner at London's Hyde Park is the paradigmatic model of free expression. Neither the petitioners nor any of the *amici* who support them are asking the Court to abandon this traditional hallmark of an open democracy.

They seek an exception to the guarantees of the First Amendment only because of three characteristics that, they say, justify denying the protection of the First Amendment to the respondents' display of a religious symbol at Columbia's Capitol Square.

First, they argue that religious speech should not receive the protection given to secular speech.

Second, they contend that solitary, unattended religious symbols are not entitled to the protection given to spoken secular expression.

Third, they maintain that religious speech next to an important government building is different from such speech in a location that is remote from a government structure.

They assert that these three distinctions are compelled by the Establishment Clause of the First Amendment because government may not support or endorse religion. The petitioners and their *amici* do not, of course, claim that government is *actually* supporting or endorsing religion when it permits a private group to display a religious symbol at a public forum that adjoins a "core" government building. They argue only that such a display could be *mistakenly* construed by reasonable spectators as a governmental expression of support for the religion whose symbol is displayed. We submit this *amicus* brief to point up the extraordinary perniciousness of this doctrine. The proposition petitioners are advocating is that public error or misconception should override or "trump" a constitutional right. According to petitioners, speech that falls objectively within the range of expression protected by the Constitution is to be deprived of its impregnable constitutional shield only because misinformed people may fail to understand who the speaker truly is.

I

A CONSTITUTIONAL LIBERTY SHOULD NOT BE SACRIFICED TO AVOID PUBLIC ERROR

We know of no other constitutional liberty, in the Bill of Rights or elsewhere, that has been denied or restricted in any way because its exercise may result in a mistaken perception by the public. Constitutional rights must be protected by judges regardless of passing popular whims. They should surely be protected against the currents of popular misconception.

A. *The Establishment Clause Does Not Reward Error.*

Petitioners and their *amici* read into the Establishment Clause a concept that does not appear in its words and that does not emerge from its history. The Clause prohibits any "law respecting an establishment of religion." It does not prohibit any "law *that appears to respect* an establishment of religion." The draftsmen of the First Amendment did not confuse perception — even if it be reasonable misperception — with reality. They prohibited governmental conduct that *actually* establishes religion. Petitioners and their *amici* unjustifiably want the constitutional prohibition extended to conduct that may look to uninformed spectators as if it establishes religion.

Who is to decide whether there is a real likelihood of misperception? What evidence is to be presented to enable the court to determine whether the public labors under a "reasonable" misperception that government is endorsing religion? Whether the public *in fact* perceives certain governmental conduct as constituting government endorsement of religion may be discerned by conducting a

public opinion survey. Should the constitutional right to engage in private religious speech depend on such surveys?

The ramifications of this "misperception doctrine" are enormous once the petitioners' principle is applied to other forms of government conduct challenged under the Establishment Clause. If "reasonable" members of the public misperceive the exemption of houses of worship from local property taxes as government endorsement of religion, is tax exemption to be prohibited by the Establishment Clause? Compare *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970). If the public believes that governmental employment of a sign-language interpreter in a Catholic parochial school is endorsement of Catholicism, is the practice to be prohibited notwithstanding *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462 (1993)?

To be sure, this Court has inquired in past cases whether government appeared to be "endorsing" religion. But the "endorsement" test has heretofore been invoked only where government is truly the speaker. Whether a creche or menorah *displayed by the government* amounts to an unconstitutional endorsement may depend on how the public perceives the religious symbol. If it is placed at a location where only governmental announcements appear or only governmental functions take place, its presence at that restricted location may amount to endorsement. If it is part of a larger governmental display whose overall effect is not religious, it may pass muster.

But that does not mean that *private* speech should be judged by whether onlookers perceive it to be what it is or whether they misperceive it to be governmental speech. A "reasonable observer" should have no misperception of governmental endorsement of truly private displays because the "reasonable observer" must be presumed to understand

the nature of a public forum. Any other application of the "reasonable observer" standard would turn the "observer" into a heckler who has the power to expel private speech from a public forum because of his or her own ignorance of free speech traditions.

Finally, public perception may and should be affected by this Court's articulation of constitutional principles. If the Court were firmly and unequivocally to hold that government is not to be held responsible for the content of private speech in a traditional public forum, that holding would ultimately become part of the public's understanding of such a forum. If, on the other hand, this Court were to hold in this case that religious speech in such a forum may be barred because the public may misperceive it as official governmental endorsement, that holding would increase the likelihood that such expression would erroneously be attributed to the government in the future.

B. *The Government, Not a Private Speaker, Has the Burden of Preventing Error.*

If, as the petitioners and their *amici* contend, there is a serious danger that "reasonable observers" will mistakenly think that government is sponsoring religious displays in public forums adjoining government buildings, and if this danger threatens values protected by the Establishment Clause, there is a strikingly simple remedy. Government should clear the air of this misconception. Notices may be posted on and near the government structure warning the public that *all* expression in the public square is private expression. It is the government's duty, not the duty of private speakers, to educate the public on the meaning and uses of a "traditional public forum." And it is unsound public policy — as well as poor constitutional principle — to

shift that burden to the individuals who use to a public forum to deliver their private message to willing listeners.

We acknowledge that governmental agencies have routinely required groups seeking to display messages in a public forum to post signs announcing that the display is private speech and is not sponsored or endorsed by the municipality or the state. Since the burden is minimal, private speakers, including these *amici*, have, in the spirit of accommodation, displayed such written disclosures.

But that is a gratuitous private assumption of a burden that belongs with the government. It is government that regulates access to the public square, and government alone controls the appearance of the square throughout the year. Government should, therefore, post notices that say, in substance, "This is a public forum open to the private expression of views. Statements made at this location and displays that are exhibited here are not official government expressions and are not endorsed by the government." The *only* burden that might then be imposed on the private speaker is to label the display with a sign identifying the particular private organization or individual who is speaking.

Petitioners and their *amici* are not content with shifting the burden of conveying this clarification to private religious speakers. Their view is that because the public is, or may be, unaware of this quality of a public forum, speakers on religious subjects may be excluded entirely from the public square. That attitude perpetuates ignorance while suppressing a constitutional liberty.

II

PRIVATE RELIGIOUS SPEECH IS CONSTITUTIONALLY ENTITLED TO NO LESS PROTECTION THAN PRIVATE SECULAR SPEECH

The Establishment Clause obviously inhibits the government's authority to "speak" on religious subjects. Government may surely not issue official pronouncements that support one religion, all religions, or, for that matter, promote disbelief in religion. The ban against any "law respecting an establishment of religion" means that government must remain silent or neutral in the sphere of religion.

But that restriction is wholly inapplicable to *private* speech. A private citizen's freedom to speak in a public forum may not be circumscribed on account of the content of his speech. A private citizen is as free to talk about religion as to talk about politics or sports.

Petitioners and their *amici* argue for special constitutional rules governing private religious speech that would permit its suppression depending on the form of the speech (*i.e.*, whether it is an oral utterance or an "unattended display") and on its location (*i.e.*, whether it is in a public park that is near a government building). Such special rules plainly would not apply to private secular speech. An individual who wanted to discuss the subject of AIDS research, or abortion rights, or affirmative action would not be barred from expressing his or her views through an unattended display or sign. Nor would he or she be restricted in any manner from speaking in a public park that is adjacent to Town Hall or to some other government building.

Private religious speech is not the First Amendment's stepchild. It is entitled to at least the same constitutional dignity as secular speech enjoys. Indeed, the Free Exercise Clause accords religious speech a preferred position. If, as is frequently true, an individual is motivated by religious conscience to erect a religious display at a public forum, his expression constitutes the free exercise of religion that the Religion Clause explicitly protects. Telling a religious observer that he may not place an "unattended display" such as a menorah in a public square or excluding his display from a public square that abuts Town Hall may inhibit his religious observance. It amounts to hostility against, not security for, religious observance. It is, therefore, *less* tolerable under our Constitution than similar restrictions on secular speech which is unprotected by the Religion Clause.

A rule that suppresses religious speech in the public forum while protecting secular speech expressed in the same manner at the same place degrades religion, in violation of the nation's history and traditions. We have composed a rhyme, quoted in *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394 n. 17 (11th Cir. 1993):

> There once was a young rabbi of Chabad
> Who thought the Constitution was odd
> To protect private speech in a public place
> On AIDS, abortion or race,
> But to prohibit anyone's mention of God.

III

A TEMPORARY RELIGIOUS DISPLAY, EVEN IF SOLITARY AND UNATTENDED, IS ENTITLED TO THE CONSTITUTIONAL PROTECTION GIVEN TO EXPRESSION

Petitioners and their *amici* do not contend that symbols and displays are outside the protection of the Free Speech Clause of the First Amendment. They argue only that a display that is "solitary" and "unattended" is more likely to be misperceived as governmental expression than a display that does not stand alone or one that is accompanied or held by a live person.

(1) "Solitary" — The constitutional protection granted to oral expression has never been thought to depend on the number of speakers who are simultaneously at the public forum. Nor does it depend on the content of what others are saying. Speaker's Corner in London's Hyde Park is as accessible to one speaker as it is to twenty. A rule excluding the "solitary" speaker from the public forum would penalize those who are most pioneering and original — those who choose unpopular times to speak or unusual means of communicating their messages.

The same is true of displays. The fact that a display stands alone is not a reason to expel it. If it leads the way, others will likely follow. The display that is "solitary" today will probably not lack for company tomorrow. The facts of this case prove the point. The KKK applied for a permit to erect its symbol on the day that a permit to erect a menorah was granted.

Prohibiting the "solitary" menorah because no one else accompanies it with a secular display at Capitol Square

during the eight days of Chanukah would also make the rights of Jewish speakers depend on whether others choose to speak through displays at the same time. That is simply not a recognizable or acceptable constitutional principle.

A "solitary" display on public property is no more likely to be misperceived as governmental expression than a "solitary" speaker. Few government speakers wear government uniforms. A passerby who sees and hears a "solitary" speaker in a public park has no way of knowing whether the "solitary" speaker is or is not a governmental official. A passerby who sees a menorah or some other religious symbol standing by itself in a public park will probably also see an accompanying sign identifying its private sponsor. Hence "solitariness" is less likely to lead to misperception in the case of a display than in the case of a human speaker.

(2) "Unattended" — The notion that a display held or accompanied by a human being is entitled to broader constitutional protection than one that is "unattended" is singularly irrational. The petitioners and their *amici* attach no constitutional significance to whether the person attending the display speaks or remains mute. Their quarrel is entirely with a display that stands by itself. But a menorah or any other religious symbol conveys the same religious message whether or not a human being stands next to it or holds it. And the presence or absence of a person sheds no light on whether the display is governmental or private. Indeed, one could reasonably conclude that permitting the Pope to conduct a religious service on the National Mall implies *greater* governmental endorsement of a religious message than permitting a private unattended religious display at the same location.

We acknowledge that the erection of a *permanent* structure on government property is entirely different, for constitutional purposes, from a temporary seasonal display. When government permits a structure or symbol to stand permanently — or for extended periods of time — on government property, the message conveyed by the symbol may become the government's message. That result is not a misperception; it is a correct understanding of what the government is doing when it allocates government property in a disproportionate way. *Access* to public parks is one thing; *control* over public space is quite another. And when a religious group — or any group identified with a particular point of view — is permitted to monopolize public space, the line between access and control has been crossed.

When an unattended private religious display is permitted to stand on public property for the limited period of a religious holiday, it merely reflects the public's respect for diverse religious beliefs. Since the site is a traditional public forum, the onlooker must be presumed to know that many private unattended displays are permitted there. Many displays may deal with secular subjects, and some will relate to religion. And in no event — unless clearly indicated by their context — is it government that is expressing the message.

IV

A TEMPORARY RELIGIOUS DISPLAY AT A PUBLIC FORUM HAS THE SAME CONSTITUTIONAL PROTECTION WHETHER OR NOT A GOVERNMENT BUILDING IS NEARBY

The petitioners' final point of distinction is the proximity of a "core" government building. They argue that the same religious display may be constitutionally permissible in a public forum that has no adjacent government buildings (*e.g.*, Cincinnati's Fountain Square) but is constitutionally prohibited if an important official structure is within an onlooker's view (*e.g.*, Burlington's City Hall Park). The basis for this distinction is, presumably, that the "reasonable" observer is more likely to mistake the private display for governmental expression if a government building is also in the viewer's eye as he gazes at the display.

Whatever psychologists may say of this form of mental association — an association that seems equally effective if a picture or drawing of a recognizable government building appears on the display, regardless of the display's location — it has no real-life basis in contemporary experience. In the 1990's government officials do not address the public by posting notices in front of Town Hall or by erecting displays near government buildings. Lafayette Park in Washington, D. C., is not viewed as the President's lectern merely because the White House is across the street. Nor is the Mall perceived as the channel through which Congress communicates with its electorate simply because the United States Capitol is visible wherever one stands on the Mall.

The constitutional rule advocated by the petitioners — barring religious expression close to a government building — would silence religious speech in the most central and prominent sites in American cities. The Establishment Clause does not exile religious speech to the suburbs. If religious speech is constitutionally protected in a suburban park, it may be heard in the shadow of the Capitol.

CONCLUSION

This case tests the respect given private religious expression in American society. Petitioners and their *amici* believe that the Constitution relegates private religious speech to the status of a stepchild. Religious speech is not entitled, in their view, to all the constitutional safeguards that secular speech enjoys, and particularly not to the access that secular speech has to the traditional public forum. If religious speech is given the same status as secular speech, say the petitioners and their *amici*, the Free Speech Clause will always "trump" the Establishment Clause.

That assertion mistakenly presumes that the Establishment Clause bars private speech. In fact, the Establishment Clause does no such thing. It bars only *actual*, not perceived, governmental endorsements of, or imprimaturs upon, religion. What the Free Speech Clause "trumps" are efforts based on error and misperception to suppress religious speech.

For the foregoing reasons, the ruling of the Sixth Circuit that religious displays are constitutionally entitled to access to a public forum should be affirmed.

Respectfully submitted,

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